IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-815

JOSEPH DiPALERMO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No.

JOSEPH DIPALERMO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Joseph DiPalermo, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on August 21, 1979.

Opinion Below

The opinion of the Court of Appeals has not yet been reported. The opinion appears in Appendix "A", *infra*, p. 1a.

Jurisdiction

The judgment of the Court of Appeals was entered on August 21, 1979. A timely petition for rehearing *en banc* was denied on October 25, 1979. (Appendix "B", *infra*, p. 11a.) This petition was timely filed on or before November 24, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Has petitioner been deprived of liberty without due process of law by reason of the fact that the pre-trial procedure leading to the eyewitness identification of petitioner at trial was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification;

2. Was petitioner's conviction based upon the tainted eyewitness identification at trial;

3. Does the decision below, sanctioning sentencing proceedings in which petitioner was not allowed to cross-examine anonymous informants and was denied access to "Jencks 3500" materials, constitute a denial of petitioner's due process rights.

Statutory Provisions Involved

Title 28, United States Code, section 846 provides:

> "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense the commission of which was the object of the attempt or conspiracy."

Title 28, United States Code, section 841 provides:

> "(a) except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally . . .
>
> (1) to manufacture, distribute or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance . . ."

Statement of Facts

Petitioner, Joseph DiPalermo, was charged, along with Salvatore Lombardi, George Gillette, William Romano and Alan Kassebaum, with a conspiracy, during the period May 5, 1977 through December 8, 1977, to knowingly and intentionally manufacture, distribute and possess, with intent to distribute, quantities of methaqualone ("Quaaludes"), a Schedule II, non-narcotic, controlled substance.

1. The Facts Adduced at Trial

At trial, the government's chief witness was Vincent Marchese, a paid informant for the Drug Enforcement Administration ("DEA"). Marchese testified that Gillette, a former business associate, approached him in April, 1977 for help in purchasing chemicals for a friend named Herman* who needed them to manufacture Quaaludes.

Soon thereafter Marchese (with the help of the DEA) and Gillette procured the needed chemicals, and transported them to a warehouse in Elizabeth, New Jersey.

On October 18, 1977, DEA agents observed DiPalermo meet Gillette at Catherine and Monroe Streets in lower Manhattan. DiPalermo lives on Monroe Street. One of the DEA agents, in a "walk-by," overheard DiPalermo say to Gillette, "It's a lot of money," to which Gillette replied, "I know it's a lot of money, that's why you've got to straighten it out." The agent did not know what was being discussed. The agent followed DiPalermo to the downtown Diamond Exchange after the conversation.

On October 26, 1977, the same DEA agent, again at Catherine and Monroe Streets, overheard DiPalermo say to Gillette, "This is what you do."

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* The government contended that "Herman" was an alias for Salvatore Lombardi.

On October 31, 1977, Marchese and Gillette moved the chemicals from Elizabeth, New Jersey, to Staten Island.

On November 14, 1977, after arresting Kassebaum nearby, DEA agents entered a house located at 135 Ellis Street, Staten Island, and discovered the chemicals and a laboratory.

At trial, Ryland Luttrell, a 68 year old watchman for the subject 13 acre site on Ellis Street, Staten Island, bordering the Arthur Kill waterway, identified, over objection and after denial of a motion to suppress the identification, DiPalermo as being one of three men who arrived by car at the Ellis Street property on or about September 14, 1977.

Luttrell described the premises, known as 135 Ellis Street, as a "sort of a ship yard" that contained a 600 foot dock with slips for boats.

Luttrell testified that DiPalermo emerged from the back seat of the car and remained at the foot of the dock. Two younger men emerged from the front of the car, walked down the dock with Luttrell and discussed the possibility of bringing a boat into one of the slips on the dock. The two younger men walked back to DiPalermo and talked to him; however, Luttrell could not hear the conversation. Luttrell could not describe the two younger men with whom he talked and had no conversation with DiPalermo.

Luttrell's pre-trial identification of DiPalermo from a photographic array transpired as follows. On March 11, 1978, DiPalermo was arrested by DEA agents on a warrant pursuant to the indictment herein. He was processed and photographed.

On March 27, 1978, DEA Agent Nargi prepared a photographic array consisting of DiPalermo's mug-shot and four other photographs, which he then showed to Luttrell for purposes of making a pre-trial identification of the man

Luttrell saw at the Ellis Street site on or about September 14, 1977.*

Although Luttrell had previously described the older gentleman who arrived at Ellis Street by car on or about September 14, 1977 as *six foot, with salty grey hair,* he picked out DiPalermo's mug-shot from the array as the man he saw that day.

Joseph DiPalermo is *five foot three and one-half* (3½") inches tall, virtually bald, and his remaining hair is not grey.

Agent Nargi testified that he knew the day before Luttrell was to appear at his office that he was going to show Luttrell DiPalermo's mug-shot in a photospread. He conceded that the DiPalermo mug-shot was the newest photograph depicting the thinnest, oldest man in the group. He made no effort to cover the "Drug Enforcement Agency" sign that DiPalermo held in front of him (see Appendix "C", *infra,* p. 13a).

Nargi also conceded that perhaps he should have selected photographs that were closer in description to DiPalermo and it was "very likely" he could have found somebody else who looked a little more like DiPalermo.

2. The Verdict

On August 18, 1978, the jury returned a verdict of guilty against DiPalermo and the remaining co-defendants.

3. The Sentencing Hearing

The Probation Department's presentence report stated that DiPalermo was a member of organized crime. DiPalermo objected to that allegation. On November 3, 1978 the Court conducted a sentencing proceeding at which FBI agents were permitted to testify as to what their unnamed and undisclosed informers had told them about DiPalermo.

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* A copy of said photographic array may be found in Appendix "C" *infra,* p. 13a.

Prior to the imposition of the sentence, Judge Neaher stated:

> "Now, I think in order to give you the full benefit of any questions you may expect to raise on appeal with respect to the sentencing procedure here, I'm changing my mind, and I'm going to declare that I have been to some extent influenced by what I have heard here in court concerning [DiPalermo's] alleged connections with organized crime and other matters" (S105-106).*

DiPalermo was sentenced to five years imprisonment on the instant conviction plus two years imprisonment as a second offender to be served consecutively. In addition, he was fined $10,000 and placed on special parole for the remainder of his natural life.

Reasons for Granting the Writ

Petitioner respectfully submits that this petition should be granted for three reasons:

(a) The Second Circuit has decided a crucial federal and constitutional due process question regarding pre-trial photographic procedures leading to an eyewitness identification at trial in a manner in conflict with applicable decisions of this Court;

(b) The Second Circuit has decided a crucial federal and constitutional due process question regarding pre-trial identification procedures leading to an eyewitness identification at trial in a manner that so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision; and

* "S" references are to the November 3, 1978 sentencing proceeding.

(c) The Second Circuit has decided a crucial federal and constitutional question regarding the due process safeguards and protection which must be accorded a criminal defendant at a sentencing hearing in a manner in conflict with applicable decisions of this Court, in conflict with a decision of another Court of Appeals, and in a manner that so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The pre-trial identification procedures sanctioned by the Second Circuit in this case were so impermissibly suggestive, within the meaning of those words as defined by this Court, that petitioner was identified at trial as a co-conspirator by the subject eyewitness despite the following facts:

(a) the eyewitness originally described the subject co-conspirator he had seen at the scene of the crime on or about September 14, 1977, as *"six foot, with salty gray hair"*;

(b) subsequently, on March 27, 1978, the eyewitness, presented with an impermissibly suggestive photographic array, identified the "mug-shot" of petitioner as the man he saw on or about September 14, 1977;

(c) subsequently, at trial, influenced by the tainted photographic identification, the eyewitness identified petitioner as the man he had seen; and

(d) the eyewitness did so:

1. despite the fact that he originally described the man he saw at the scene as "six foot, with salty gray hair"; and

2. despite the fact that petitioner is five foot three and one half inches tall, is virtually bald, and his remaining hair is *not* "salty gray".

It is submitted that the *stark and irreconcilable* contrast between the appearance of the man the eyewitness origin-

ally identified as the man he saw at the scene of the crime (prior to the tainted photographic identification) and the man he identified (petitioner) after the tainted photographic array as the man he had seen, establishes beyond doubt a blatant violation of petitioner's due process rights herein.*

As is established *infra,* this due process violation was caused by the failure of the Second Circuit to adhere to the prevailing standards and guidelines established by this Court in connection with pre-trial photographic identification procedures.**

POINT I

The Pre-Trial Photographic Identification Procedure Leading to the Eyewitness Identification of Petitioner at Trial Was So Impermissibly Suggestive as to Give Rise to a Very Substantial Likelihood of Irreparable Misidentification.

A. The Pre-Trial Suppression Hearing

At the pre-trial suppression hearing, Luttrell (the subject eyewitness) testified that approximately two weeks after Labor Day 1977 (about September 14, 1977), three men arrived by car at the Ellis Street yard where the illegal laboratory was set-up. When they arrived Luttrell "happened to be down by the water . . . and met them at the dock. The two younger men exited first, then the third man, who was identified as DiPalermo.

Luttrell and the two younger men went on the dock*** where they had a conversation regarding the depth of the

* The photograph of DiPalermo in the photographic array sticks out like a sore thumb (see Appendix "C", *infra,* p. 13a).

** Indeed, there was no justification whatever for a pre-trial photographic array in this case (see p. 13, *infra*).

*** The length of the dock was 600 feet.

water and width of the dock. The younger men then walked back to the third man and engaged him in conversation. Luttrell could not hear what was being discussed because "I wasn't close enough". When asked whether the third man stayed in the background, Luttrell said, "Well, he was at the foot of the dock". Luttrell did not speak with the third man.

Luttrell said he looked at the third man because he thought he was crippled—but actually he was not.

Although Kassebaum was supposedly in charge of the laboratory at Ellis Street and was in the courtroom, Luttrell could not identify him.

On cross-examination, Luttrell testified that the U.S. Attorney's office told him to come to court where he was going to identify the individual whose picture he had previously selected. He then said he was to identify the man in the yard.

When Luttrell went to Nargi's office at the DEA, in order to make his photographic identification, he knew Nargi was a drug agent. He met Nargi when the November 14 raid occurred. Prior to selecting pictures, Luttrell knew the agents thought there were drugs in the house at Ellis Street.

Luttrell, prior to picking out DiPalermo's picture, had described him to Agent Nargi as *six feet tall with salty grey hair.* He did not describe any facial features.

The photographic array shown to Luttrell by Agent Nargi is reproduced in Appendix "C" *infra,* p. 13a.

Nargi conceded that (1) DiPalermo's picture contained three "shots" of him while the others were single or dual shots; (2) DiPalermo's picture was newer than the others; and; (3) DiPalermo's picture depicted an obviously thinner, more frail looking man than the others. Nargi did not

deny that DiPalermo's picture stuck out like a "sore thumb". Finally, Nargi stated that if he had to do it all over again, he "possibly would have looked until I could find somebody else that looked more like [DiPalermo] ". Nargi knew DiPalermo was 71 years of age. He made no attempt to cover the "Drug Enforcement Administration" sign that appears on DiPalermo's mug-shot.

Although Luttrell swore that he had seen DiPalermo's picture only once, Nargi testified that DiPalermo's picture, in the array, was again shown to Luttrell in front of Mr. Appleby later that day.

The trial judge denied the motion to suppress.

B. The In-Court Identification

At trial, Luttrell identified DiPalermo as one of the three men who visited Ellis Street, on or about September 14, 1977.

Luttrell testified that he had watched DiPalermo "close" because he was looking to see if he was crippled. Luttrell could not describe the two younger men with whom he spoke. Further, he stated that people came to Ellis Street every day.

DiPalermo's counsel then placed the photographic array into evidence. DiPalermo's mug-shot became Defendant's Exhibit H.

At page 608 of the trial transcript, the following occurred on cross examination of Luttrell:

> "Q. Did you notice that the man that you picked out [DiPalermo] was skinnier than all of the rest (of the persons in the photo array)?
>
> A. He was a *little taller* than the rest of them, too." (emphasis added)

C. The Relevant Law and It's Application to the Facts

One of the leading decisions of this Court regarding pre-trial photographic identification procedures is *Simmons* v. *United States,* 390 U.S. 377 (1968). In *Simmons,* the Court stated:

> "convictions based upon eyewitness identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to the very substantial likelihood of irreparable misidentification." (at 384).

The *Simmons* Court recognized that a witness who is shown an improper array "thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification" (390 U.S. at 383-84).

This danger is graphically illustrated in the case at bar. Luttrell testified at trial that the man he picked out in the photograph array (DiPalermo) "was a *little taller* than the rest of them, too" (emphasis added). First, there was no way Luttrell could form that opinion from the array. DiPalermo's mug-shot was the only photograph in the array that depicted a person "full body". The rest were shots from the chest or shoulders up.* It is clear that Luttrell retained his erroneous perception of DiPalermo's photograph when he gave that testimony. Coupled with his prior description of DiPalermo as six foot tall with salty grey hair,** DiPalermo could not possibly be the man he saw at Ellis Street.

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* Two other photographs in the array depict persons taller than DiPalermo.

** A completely opposite description of DiPalermo who stands five foot, *three and one-half* (3½") inches and is virtually bald with no grey hair.

Where the pre-trial identification procedure is deemed suggestive, inquiry extends to the reliability of the in-court identification, viewed within the "totality of the circumstances." *Manson* v. *Braithwaite,* 432 U.S. 98 (1977); *Neil* v. *Biggers,* 409 U.S. 188 (1972).

In the case at bar the Second Circuit did find the photographic identification procedure "subject to criticism" (Appendix "A", *infra,* p. 7a-8a).

In *Neil* v. *Biggers, supra,* this Court, in evaluating a rape victim's identification of her attacker, enumerated the factors which must be considered in evaluating the likelihood of misidentification:

1. the opportunity of the witness to view the criminal at the time of the crime;
2. the witness' degree of attention;
3. the accuracy of the witness' prior description of the criminal;
4. the level of certainty demonstrated by the witness at the confrontation; and
5. the length of time between the crime and the confrontation. (409 U.S. at pp. 199-200)

In *Biggers,* in view of the above guidelines, this Court, in holding that it was proper to allow the identification evidence to go to the jury, found that the victim spent a considerable period of time with her assailant, up to half an hour. She faced him directly and intimately and was no casual observer. Her description as to age, height, weight, complexion, skin texture, build and voice was more than ordinarily thorough. The Court did note, however, that a lapse of seven months between the rape and confrontation "would be a seriously negative factor in most cases" (409 U.S. at p. 201).

It is respectfully submitted that the Second Circuit failed to properly apply the *Biggers* guidelines in the instant case:

(a) ***the identification process was impermissibly suggestive.***

Agent Nargi arranged a photographic array wherein DiPalermo's picture virtually stood out by itself. The persons depicted in the other four photographs have no reasonable resemblance to DiPalermo. Luttrell knew that Nargi was an agent of the Drug Enforcement Administration and that the agents suspected drugs in the house at Ellis Street. DiPalermo's picture bore the DEA legend on its face. The picture was clearly a mug-shot, dated two weeks prior. The photograph depicted three views of DiPalermo; the others were either a single or dual photograph. DiPalermo's photograph was the newest of the group and obviously depicted the thinnest, oldest man.

Nargi knew the day before that he was going to show Luttrell DiPalermo's mug-shot. He made no effort to find photographs in the possession of the DEA—other than those he had immediately available to him—that bore a closer resemblance to DiPalermo. The entire process was again repeated for Mr. Appleby that day, obviously reinforcing the photograph's image in Luttrell's mind.

Furthermore, there was no *necessity* for the photographic array. DiPalermo and the other defendants had already been indicted and arrested for the Quaalude conspiracy charged here. A corporeal lineup would have been the better way to display the defendants to Luttrell.* *See,*

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* If there was a post-indictment lineup with DiPalermo, his counsel would have had a right to be present. *United States* v. *Wade,* 388 U.S. 218 (1967). We respectfully submit that there should be no different rule or standard for a post-indictment confrontation via photographic array.

P. Wall, *Eye-Witness Identification in Criminal Cases,* n. 1 at 70.

(b) *The likelihood of misidentification by Luttrell was sufficiently great to make the use of his trial identification of DiPalermo a denial of due process under the Biggers guidelines.*

1. *There was no testimony of the length of time Luttrell viewed the third man at the yard*

Luttrell was certainly not looking at third man's face when he exited the car since Luttrell obviously was preoccupied with the notion that the man was a cripple. Thereafter, Luttrell and the two other men walked on the dock having a discussion about a boat, leaving *the third man* at the foot of the dock. When the two younger men returned to talk to *the third man,* Luttrell was not close enough to hear the conversation.

2. *Luttrell had little motivation to study the face of the third man*

No crime was being committed; Luttrell was not a victim —he was at best a casual observer. If anything, he was focused on the third man's body which he thought was crippled. Luttrell had no discussion with the third man.

3. *Luttrell's prior description of the criminal bore no resemblance to DiPalermo*

Before selecting the photograph from the suggestive array, Luttrell described the third man as six foot tall with salty grey hair—clearly not a description of DiPalermo, who is 5′ 3″ and almost bald. He gave no other descriptions such as age, height, facial features, complexion, etc.

At trial, he testified that DiPalermo was a "little taller" than the rest of those in the array. This description was

impossible to make since none of the other photographs in the array even suggest this.

Luttrell's reliability of identification and recollection is open to still further scrutiny. He did not identify Kassebaum at the pre-trial hearing although he was in court and was the man in the lab. Luttrell was "positive" that he was never shown a single, isolated photograph of Gillette. Nargi testified, however, that Luttrell was shown only a single shot of Gillette. Lack of specificity as to dates, times, and places runs throughout his testimony.

4. *Luttrell's level of certainty*

Although Luttrell picked DiPalermo's picture without hesitation, this is not surprising in light of the unfair array. It must be noted that Luttrell could not even offer a description of the two younger men at the yard with whom he spoke. It is equally not surprising that he identified DiPalermo in court without any difficulty. He was, we maintain. identifying the man in the picture, not the man he described as being in the yard.

5. *The length of time between the crime and the confrontation*

More than six months had elapsed between the event at the yard (two weeks after Labor Day, 1977) and the confrontation via photographic array (March 27, 1978). The event at the yard could not have been memorable to Luttrell since he did not even mention it to Nargi until just prior to the photographic array.* The time gap was significant and was just shy of the seven months in *Neil* v. *Biggers* that caused the Court to say it "would be a seriously negative factor . . ." (409 U.S. at p. 201).

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* No mention of the event at the yard was made by Luttrell in the Grand Jury.

6. *Conclusion*

In sum, it is submitted that the Second Circuit has failed to properly apply the *Biggers* guidelines in this case,

In *Jackson* v. *Fogg,* 589 F.2d 108 (2nd Cir. 1978), the Second Circuit stated:

> "Centuries of experience in the administration of criminal justice have shown that convictions based solely on testimony that identifies a defendant previously unknown to the witness is highly suspect. Of all the various kinds of evidence it is the least reliable, especially where unsupported by corroborating evidence...
>
> The dangers of convicting on identification testimony alone are well known to those whose duty it is to prosecute crime."

We respectfully submit that there was no other credible evidence which would have warranted the conviction.* Luttrell's identification is what convicted DiPalermo.

POINT II

Petitioner's Conviction Was Based on the Tainted Eyewitness Identification at Trial.

The evidence in this case offered against DiPalermo consisted of Luttrell's identification, two meetings on the street with Gillette and the hearsay utterance of Marchese to the effect that Gillette told him that Joseph DiPalermo was "his friend in New York".

1. The October 18 Meeting With Gillette

There was nothing in the conversation that was overheard that was even arguably referable to the charged

* Point II, *infra.*

conspiracy to manufacture and possess Quaaludes. After Gillette said, "I know its a lot of money, that's why you've (DiPalermo) got to straighten it out", DiPalermo left for the downtown Diamond Exchange.

Absent any nexus with the activities of the conspiracy, the October 18 meeting is insufficient to serve as a stepping stone to a conviction.

2. The October 26 Meeting With Gillette

On this date, DiPalermo said to Gillette, "This is what you do." Again, there is nothing referable to the conspiracy charged.

3. The "friend in New York"

Marchese testified that in March or April, 1977 he had a conversation with Gillette wherein Gillette told him that his "friend in New York" was really Joseph DiPalermo.

This occurred prior to the time frame in the indictment with reference to the conspiracy and, in any event, could not have been said in furtherance thereof. It was pure hearsay and its admission, in light of the absence of other direct evidence of guilt, is impermissible.

The law of conspiracy is settled that when the government seeks to introduce an out of court statement of a declarant against a defendant in order to link that defendant to a conspiracy, there must be independent proof of the defendant's participation in the conspiracy which establishes "by a fair preponderance of the evidence independent of the hearsay utterances" the defendant's participation in the conspiracy. *United States* v. *DeFillipo,* 590 F.2d 1288 (2nd Cir. 1979).

4. Conclusion

In sum, the only probative evidence against DiPalermo was Luttrell's identification of him as the "third man" who was at the illegal laboratory premises in September, 1977.

POINT III

The Decision Below, Sanctioning Sentencing Proceedings in Which Petitioner Was Not Allowed to Cross-Examine Anonymous Informants and Was Denied Access to "Jencks 3500" Materials, Constitutes a Denial of Petitioner's Due Process Rights.

The argument that a convicted criminal defendant is entitled, at his sentencing hearing, to confront and cross-examine his accusers and to procure "Jencks 3500" material is set forth at length in the Petition to this Court of Daniel Fatico for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, filed in this Court November 20, 1979.

We respectfully refer this Court to the Petition of Daniel Fatico which contains a full elaboration of said argument which is equally applicable herein.

CONCLUSION

For the reasons stated above, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDIX "A"

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 962, 963,
964, 987 August Term, 1978

(Argued May 2, 1979 Decided August 21, 1979)

Docket Nos. 78-1408, 78-1413,
79-1032, 79-1046

FILED
AUG 21 1979
A. DANIEL FUSARO, CLERK

UNITED STATES OF AMERICA,

Appellee,

v.

JOSEPH DIPALERMO, a/k/a "Joe Beck",
SALVATORE LOMBARDI, a/k/a "Herman",
GEORGE GILLETTE and ALAN KASSEBAUM,

Appellants.

Before:

GURFEIN and MESKILL, *Circuit Judges*, and
WYZANSKI*, *District Judge.*

Appeals from judgments of conviction entered in the United States District Court for the Eastern District of New York, Edward R. Neaher, *Judge,* after a three-week jury trial.

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* Hon. Charles E. Wyzanski, Jr., of the United States District Court for the District of Massachusetts, sitting by designation.

Appendix "A"

Affirmed.

MICHAEL ROSEN, New York, New York (Roy M. Cohn, Saxe, Bacon & Bolan, P.C., of counsel), *for Appellant DiPalermo*

ROGER BENNET ADLER, New York, New York (Gustave H. Newman, New York, New York, of counsel), *for Appellant Lombardi*

RAYMOND B. GRUNEWALD, New York, New York, *for Appellant Gillette*

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RICHARD APPLEBY, Assistant United States Attorney, Eastern District of New York (Edward R. Korman, United States Attorney, Harvey M. Stone, Assistant United States Attorney, Vivian Shevitz, Assistant United States Attorney, Eastern District of New York, of counsel), *for the United States of America*

PER CURIAM:

Joseph DiPalermo, Salvatore Lombardi, George Gillette and Alan Kassebaum appeal from judgments of conviction entered in the United States District Court for the Eastern District of New York, Edward R. Neaher, *Judge,* after a three-week jury trial. All of the appellants were convicted of conspiring to manufacture and possess with intent to distribute methaqualone, commonly known as "quaaludes," in violation of 21 U.S.C. § 846. Kassebaum was also convicted of possession of methaqualone with intent to distribute, 21 U.S.C. § 841(a)(1). Finding no reversible error, we affirm the judgments of conviction.

Appendix "A"

Viewing the evidence in the light most favorable to the government, *Glasser* v. *United States,* 315 U.S. 60, 80 (1942), the government showed that the following series of events took place. Beginning in April of 1977, one Vincent Marchese, a paid informant for the Drug Enforcement Administration, insinuated himself into a conspiracy to manufacture quaaludes. On April 15, Marchese met with appellant Gillette at Marchese's home in Staten Island. Gillette told Marchese that he had a friend named "Herman" who had manufactured quaaludes in the past but who needed a new supply of chemicals in order to stay in the business. "Herman" was apparently able to come up with the money, but had thus far been unable to come up with a connection leading to the necessary supplies—approximately 490 pounds of various chemicals. Marchese agreed to locate the needed source and immediately called the DEA, which in turn contacted the Berg Chemical Company. Marchese then informed Gillette that he had been successful in his search, and that the price of the chemicals would be $10,000—a price to which "Herman" agreed. Marchese and Gillette picked up the chemicals on June 23, 1977, and took them to a previously secured warehouse in New Jersey. The chemicals having been purchased, the next step was to create a manufacturing laboratory—a task to which "Herman" was assigned.

Much to Marchese's and Gillette's consternation, however, "Herman," who by this time had been identified by the DEA as appellant Lombardi, was unable to locate the needed facility. Almost four months elapsed before the laboratory began to take shape. In the middle of September, Ryland Luttrell, caretaker and watchman at 135 Ellis Street in Staten Island, was visited by three men, one of whom Luttrell subsequently identified as appellant DiPalermo. The visitors took a look around the premises—

no doubt taking note of the fact that 135 Ellis Street is in a remote area of Staten Island, that the property occupies about 13 acres of land, and that situated thereon was a rather run-down old house, as well as a dock. Luttrell observed DiPalermo get out of the car, but he was approached only by DiPalermo's two companions. These two men asked Luttrell certain questions about the condition of the dock and the depth of the water, reported back to DiPalermo, returned to ask a few more questions, again returned to the car, and drove off.

Approximately a month later, Gillette was observed by the DEA at the Ellis Street location. When he left the premises, DEA agents followed him into lower Manhattan, observed him make a series of telephone calls from a public booth and, fifteen minutes after making the calls, being joined by DiPalermo. One of the agents strolled by Gillette and DiPalermo and overheard the following conversation:

> DiPalermo: It is a lot of money.
>
> Gillette: I know it is a lot of money. That's why you've got to straighten it out.

After about fifteen minutes, DiPalermo left. A week later, Gillette was again observed at the Ellis Street site. Upon leaving, he was again followed to the same street corner in lower Manhattan where he again met with DiPalermo. Again a DEA agent walked by them, this time overhearing DiPalermo saying to Gillette: "This is what you do."

Five days later, on October 31, the chemicals were moved from the New Jersey warehouse to 135 Ellis Street, the entire day's activities being monitored by the DEA. Gillette and Marchese began the day by removing the chemicals from the New Jersey warehouse and depositing them into a Ryder rental truck. Gillette then drove the truck to Lombardi's Staten Island address, with Marchese follow-

ing in Gillette's car. Gillette explained to Marchese that the truck was being left there so that "Herman" could keep an eye on it. Shortly after that, DEA agents observed Lombardi driving the truck on a route leading directly to 135 Ellis Street. At a certain point in its travels, however, the truck began to vary its speeds considerably and take what are commonly referred to as "evasive maneuvers." Eventually, the truck worked its way back to Lombardi's residence. Later that night the truck was observed at 135 Ellis Street, where the chemicals were unloaded and taken into the house. Gillette later explained to Marchese that "Herman" had successfully delivered the chemicals to the soon to be operating laboratory. Gillette also explained to Marchese that the DEA surveillance had been picked up during the attempted delivery of the chemicals, that he was troubled by this development, and that he would have to talk to his "friend in New York" about the situation. His "friend in New York" turned out to be named "Joe Beck," which is apparently a name used on occasion by appellant DiPalermo.

Because none of the participants in the scheme had sufficient knowledge of chemistry to go about manufacturing marketable quaaludes, they next set about the task of recruiting someone who did. Appellant Kassebaum, a licensed New York pharmacist, apparently fit the bill. Both Luttrell and various DEA agents observed Kassebaum at the 135 Ellis Street site on a number of occasions. Upon leaving Ellis Street on one such occasion, he was followed by DEA agents who subsequently overheard him state over a telephone: "I finally got something good and nice for you. It turned color."[1] DEA agents subsequently observed Kassebaum purchasing paraphernalia that was eventually seized at the laboratory.

---

[1] A DEA chemist testified at trial that color is an indication of the degree of purity of methaqualone.

Appendix "A"

On November 14 the DEA closed in, arresting Kassebaum a short distance from the Ellis Street laboratory and escorting him back to the premises so they could execute a search warrant. Kassebaum broke free, however, ran into the house and closed the door behind him. The agents, locked out of the house, determined that Kassebaum had fled to the bathroom and had begun flushing evidence down the toilet. They forced their way in and found Kassebaum shielding himself behind his German Shepherd. The agents prevailed, however, took Kassebaum into custody, and proceeded to search the laboratory. In the first floor bathroom they discovered a brown powder which turned out to be methaqualone; during their search of the rest of the house they seized more methaqualone, various pieces of laboratory equipment, and the chemicals that had been purchased by Marchese and Gillette from the Berg Chemical Company.

In our judgment, only two of the issues raised by the appellants warrant discussion, those issues focusing on Luttrell's in-court identification of DiPalermo and the nature and sufficiency of the evidence to support the conviction of Lombardi.

After all of the defendants has been arrested, the DEA interviewed Luttrell regarding his recollection of the happenings at 135 Ellis Street. He described an individual who fit the description of Gillette and, when shown a photograph of Gillette, identified him as one of the men to whom he had spoken about renting the Ellis Street facility. At that point, the DEA put together a spread of photographs, including photographs of DiPalermo, and asked Luttrell if he recognized any of the subjects. Luttrell picked out DiPalermo as someone who had been at the Ellis Street site, and he related the details of DiPalermo's visit. Luttrell subsequently identified DiPalermo during the trial as one of the individuals he had seen at the Ellis Street location.

Appendix "A"

This Court has recently explained the law as it relates to in-court identifications that have been preceded by pretrial photographic identifications in the following fashion:

> A conviction "based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." . . . "[R]eliability is the linchpin in determining the admissibility of identification testimony," . . . and the court must look to the "totality of the circumstances" to determine whether the in-court identification is reliable even if the pretrial identification procedure was suggestive.

United States v. *Sanchez,* slip op. 3901, 3907-08 (2d Cir. July 19, 1979), *quoting Simmons* v. *United States,* 390 U.S. 377, 384 (1968); *Manson* v. *Brathwaite,* 432 U.S. 98, 114 (1977); *and Neil* v. *Biggers,* 409 U.S. 188, 199 (1972). *See generally United States* v. *Williams,* 596 F.2d 44, 48-49 (2d Cir. 1979); *Jackson* v. *Fogg,* 589 F.2d 108, 111 (2d Cir. 1978); *United States* v. *Moskowitz,* 581 F.2d 14, 19-20 (2d Cir.), *cert. denied,* 99 S.Ct. 204 (1978). Included in the "totality of the circumstances" are "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of the certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *Neil* v. *Biggers, supra,* 409 U.S. at 199-200.

Although DiPalermo's counsel has pointed to certain weaknesses in the government's procedures and in Luttrell's identification, it is our judgment that, with a view toward

the "totality of the circumstances," the identification passes muster. Although the photographic identification procedure is subject to criticism because there were more photographs of DiPalermo than of any of the others and because DiPalermo's photograph had a DEA label, it is nevertheless our conclusion that this did not "give rise to a very substantial likelihood of irreparable misidentification." In addition, it is our conclusion that Luttrell's identification of DiPalermo in the courtroom was a "reliable" one. Luttrell, after all, was responsible for scrutinizing visitors to the Ellis Street location, and he had a good deal of time during which to view DiPalermo, some of which was spent at relatively close range.

As to appellant Lombardi, it is our judgment that there was sufficient non-hearsay evidence to justify the admission of statements made by his fellow conspirators and that, with this evidence properly admitted, there was sufficient evidence to support his conviction. On this issue as well, this Court has on recent occasion set out the governing law. In *United States* v. *Lyles,* 593 F.2d 182 (2d Cir.), *cert. denied,* 47 U.S.L.W. 3636 (U.S. Mar. 26, 1979), we said:

> When in a criminal case the government seeks, under the co-conspirator rationale, to introduce as an admission the out-of-court statement of a declarant other than the defendant, the trial judge must make a preliminary determination that there is sufficient independent evidence to establish the following: (1) that a conspiracy existed . . . ; (2) that the conspiracy was still in existence at the time the statement was made . . . ; (3) that the declarations were made in furtherance of the conspiracy . . . ; and (4) that both the declarant and the defendant participated in the conspiracy . . . . While the practicalities of proof may require that a particular statement be

> admitted subject to connection, that is, subject to an adequate showing of the elements just summarized, "if at the close of the Government's case the connection has not been proved, the court must, upon motion, strike the insufficiently connected item and direct the jury to disregard it."

593 F.2d at 194 (citations and footnote omitted). And in *United States* v. *DeFillipo,* 590 F.2d 1228 (2d Cir. 1979), the Court reaffirmed the principle that participation by the defendant in the alleged conspiracy must be "established 'by a fair preponderance of the evidence independent of the hearsay utterances.' " 590 F.2d at 1236, *quoting United States* v. *Geaney,* 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied,* 397 U.S. 1028 (1970). *See also United States* v. *Ziegler,* 583 F.2d 77, 81 n.6 (2d Cir. 1978); *United States* v. *Stanchich,* 550 F.2d 1294, 1297-99 & n.4 (2d Cir. 1977); *United States* v. *Glazer,* 532 F.2d 224, 228-29 (2d Cir.), *cert. denied,* 429 U.S. 844 (1976); *United States* v. *Wiley,* 519 F.2d 1348, 1350-51 (2d Cir. 1975), *cert. denied,* 423 U.S. 1058 (1976). *Compare United States* v. *James,* 590 F.2d 575 (5th Cir.) (en banc), *cert. denied,* 47 U.S.L.W. 3786 (U.S. June 4, 1979).

Although we believe the case to be close in this regard, it is our conclusion that this requirement was met. Lombardi's repeated associations with the other members of the conspiracy, especially his involvement with the rental truck that carried the needed chemicals to the Ellis Street laboratory, provided strong ground for the conclusion that Lombardi was involved in an unlawful conspiracy. Although each of the bits of evidence produced by the government to support the conclusion that Lombardi was a co-conspirator would by itself be equally consistent with innocence, such pieces of evidence are to be viewed "not in isolation but in conjunction." *United States* v. *Geaney,*

supra, 417 F.2d at 1121. *See also United States* v. *Monica,* 295 F.2d 400, 401 (2d Cir. 1961), *cert. denied,* 368 U.S. 953 (1962) ("each of the . . . episodes gained color from each of the others"). As explained by Judge Friendly in *United States* v. *Stanchich, supra,* "[j]udges are not required to exhibit a naiveté from which ordinary citizens are free." 550 F.2d at 1300. In this light, the *Geaney* test was met, and in that light, there was sufficient evidence to support Lombardi's conviction.

The other claims put forth by the appellants must also be rejected. Our review of the record satisfies us that there was sufficient evidence to support each of the convictions. Although the comments during summation by the Assistant United States Attorney in charge of the trial do not merit our approval, neither do they warrant reversal in this case. We do caution the government, however, that "[i]n conspiracy cases, where the liberal rules of evidence and the wide latitude accorded the prosecution may, and sometimes do, operate unfairly against an individual defendant," *Glasser* v. *United States, supra,* 315 U.S. at 76, the content and tone of the summation should be kept closely in check. There is no merit to the claim by Gillette that his conviction should be reversed because he conferred with DEA agents without the presence of his counsel. The record shows that Gillette initiated the contact and that he was in no way prejudiced by its having occurred. *See Weatherford* v. *Bursey,* 429 U.S. 545 (1977). DiPalermo's sentencing hearing was conducted in accord with the governing law of this Circuit. *See United States* v. *Fatico,* slip op. (2d Cir. , 1979); *United States* v. *Fatico,* 579 F.2d 707 (2d Cir. 1978). The remaining claims do not merit discussion.

The judgments of conviction are affirmed.

APPENDIX "B"

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-fifth day of October, one thousand nine hundred and seventy-nine.

Present:

HON: MURRAY L. GURFEIN,
HON: THOMAS J. MESKILL,
Circuit Judges

HON: CHARLES E. WYZANSKI,
District Judge.

Appendix "B"

Docket Nos. 78-1408, 78-1413,
79-1032, 79-1046

FILED
OCT 25 1979
A. DANIEL FUSARO, CLERK

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSEPH DIPALERMO,
SALVATORE LOMBARDY,
ALAN KASSEBAUM,
GEORGE GILLETTE,

Defendants-Appellants.

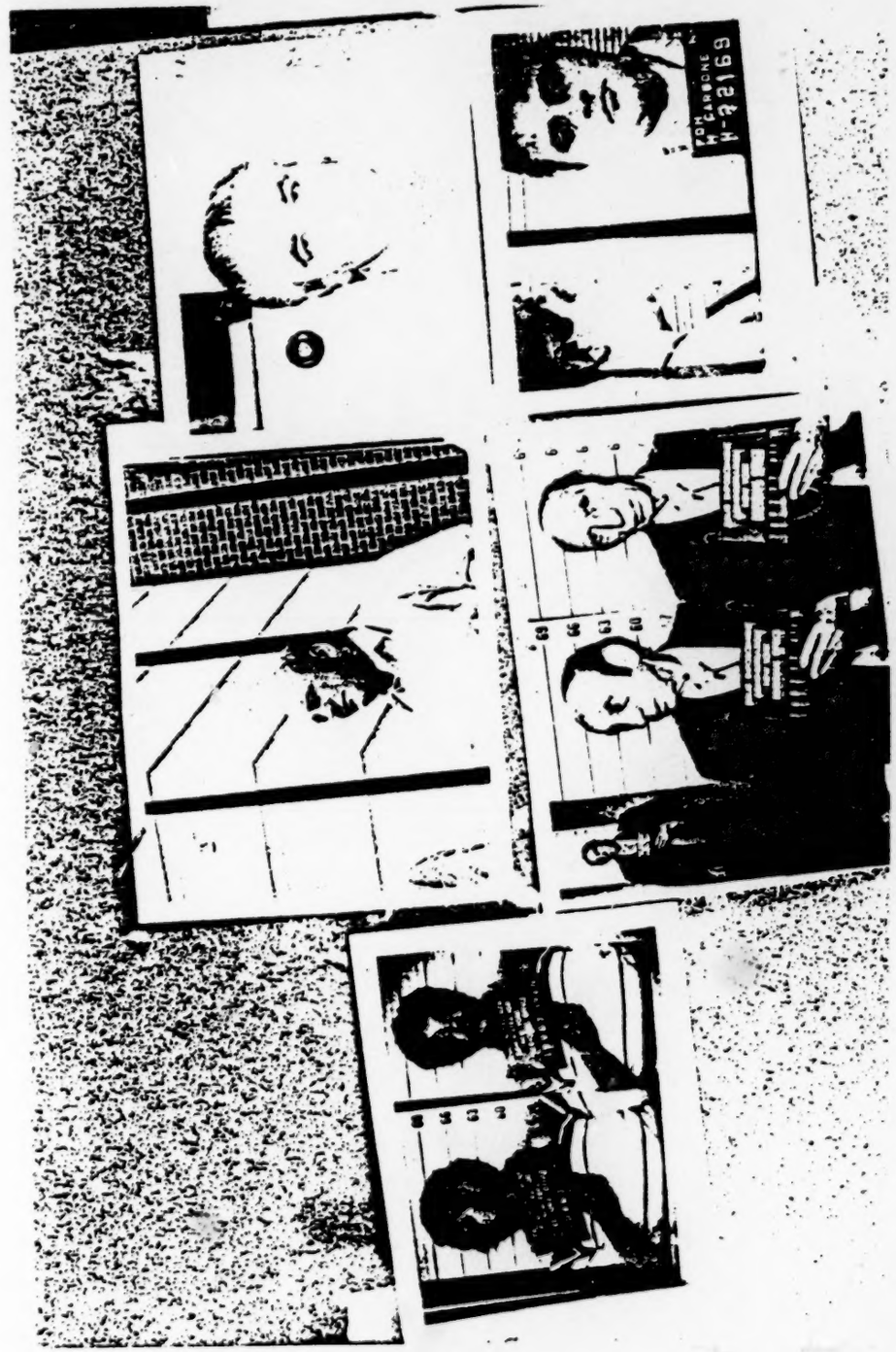
A petition for a rehearing having been filed herein by counsel for the appellant, Joseph DiPalermo.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is Denied.

A. DANIEL FUSARO,
Clerk.

APPENDIX "C"



Petitioner DiPALERMO

Composite Photographs Ex. A

Nos. 79-815 and 79-819

In the Supreme Court of the United States

OCTOBER TERM, 1979

JOSEPH DiPALERMO, PETITIONER

v.

UNITED STATES OF AMERICA

SALVATORE LOMBARDI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

LOUIS M. FISCHER
Attorney
Department of Justice
Washington, D.C. 20530

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-815

JOSEPH DIPALERMO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 79-819

SALVATORE LOMBARDI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-10a)[1] is reported at 606 F. 2d 17.

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[1]The opinion of the court of appeals is reproduced in the appendix to each petition. For the sake of convenience, all references here to the appendix will be to that in No. 79-815.

JURISDICTION

The judgment of the court of appeals was entered on August 21, 1979, and petitions for rehearing were denied on October 25, 1979 (Pet. App. B). The petition for a writ of certiorari in No. 79-815 was filed on November 23, 1979, and the petition in No. 79-819 was filed on November 24, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, an in-court identification of petitioner DiPalermo was reliable (No. 79-815).

2. Whether there was sufficient evidence independent of the in-court identification to support petitioner DiPalermo's conviction (No. 79-815).

3. Whether co-conspirator statements were properly admitted against petitioner Lombardi (No. 79-819).

4. Whether the prosecutor's closing argument deprived petitioner Lombardi of a fair trial (No. 79-819).

5. Whether the trial court, in sentencing petitioner DiPalermo, properly considered hearsay evidence of petitioner's involvement in organized crime (No. 79-815).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioners were convicted of conspiracy to manufacture and possess methaqualone with intent to distribute it, in violation of 21 U.S.C. 846. Petitioner DiPalermo was sentenced to seven years' imprisonment, to be followed by a lifetime special parole term, and was fined $10,000. Petitioner Lombardi was sentenced to five years' imprisonment, to

be followed by a five-year special parole term, and was fined $10,000. The court of appeals affirmed (Pet. App. 1a-10a).

1. The evidence at trial, which is described in the opinion of the court of appeals, showed that petitioner DiPalermo was at the center of a methaqualone manufacturing operation that included petitioner Lombardi and co-defendants George Gillette and Alan Kassebaum.[2] Briefly, the evidence showed that in April 1977 defendant Gillette told Vincent Marchese, a government informant, that he had a friend named "Herman" (later determined to be petitioner Lombardi) who had manufactured quaaludes previously but needed an assortment of new chemicals in amounts totalling about 490 pounds (Pet. App. 3a). Marchese agreed to find a source, but instead he contacted the DEA, which in turn secured the chemicals legally. "Herman" agreed to the $10,000 purchase price; Marchese and Gillette picked up the chemicals on June 23, 1977, and moved them to a secure warehouse in New Jersey (*ibid.*).

Petitioner Lombardi, who had been identified as "Herman" through DEA surveillance, failed for some four months to find a suitable location for a laboratory. Finally, in mid-September 1977, petitioner DiPalermo and two associates visited 135 Ellis Street on Staten Island. That location contained a house and dock and was quite isolated (Pet. App. 3a-4a). About a month later, Gillette was seen at the same location and was then observed by surveilling agents in a rendezvous with petitioner DiPalermo in lower Manhattan. A week later, these actions were repeated (*id.* at 4a).

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[2]Gillette and Kassebaum were also convicted at trial on charges arising from the methaqualone manufacturing operation. Gillette was sentenced to five years' imprisonment and Kassebaum to three years' imprisonment.

Some five days later, Marchese and Gillette moved the chemicals from the New Jersey warehouse to petitioner Lombardi's residence. Later that day, petitioner Lombardi was seen driving a truck on a route to the Ellis Street location, but he apparently became concerned about being followed and returned to his home (Pet. App. 4a-5a). Later that night, the truck was observed at 135 Ellis Street, where the chemicals were unloaded. Gillette later told Marchese that "Herman" had successfully delivered the chemicals despite his awareness of DEA surveillance (*id.* at 5a). Gillette also told Marchese that he would have to report the DEA's presence to his "friend in New York," one "Joe Beck," an alias for petitioner DiPalermo (*ibid.*).

Kassebaum, a licensed New York pharmacist, was recruited to do the actual manufacturing of the methaqualone. He was observed on a number of occasions at 135 Ellis Street and was overheard reporting on his progress (Pet. App. 5a). Kassebaum was arrested on November 14 a short distance from the laboratory. He broke free and attempted to flush some of the methaqualone down the toilet, but he was subdued. A more thorough, warranted search of the laboratory revealed quantities of methaqualone and the chemicals that Marchese had provided the conspirators (*id.* at 6a).

2. At petitioner DiPalermo's sentencing, he contested the pre-sentence report's conclusion that he was a high-ranking member of the Luchese crime family. As a result, the trial court held a hearing at which the government presented the testimony of three FBI agents who collectively reported information from 13 reliable informants that petitioner was a captain in the Luchese family. In addition, one criminal associate's testimony

was presented, as well as a recording of a wiretap that demonstrated petitioner's intent to murder the associate (S. Tr. 24-100).[3] In order to protect the informants' safety, the identities of the informants and the agents' notes were not revealed (*id.* at 46). In sentencing DiPalermo to imprisonment for seven years, to be followed by a lifetime special parole term, the trial court stated that it was "to some extent influenced by what I have heard here in Court concerning [petitioner's] alleged connections with organized crime and other matters" (*id.* at 106-107).

ARGUMENT

1. Petitioner DiPalermo contends (79-815 Pet. 8-16) that his identification at trial by Ryland Luttrell, the caretaker at 135 Ellis Street, as one of the men who had visited that site, was improperly tainted by Luttrell's viewing of a pretrial photographic array. Petitioner also contends (79-815 Pet. 16-17) that absent this assertedly tainted identification, there was insufficient evidence to support his conviction. These fact-bound claims were properly resolved against petitioner by both courts below, and further review is unnecessary.

a. At the outset, we note that petitioner concedes (79-815 Pet. 12), as he must, that the challenged identification must be reviewed under the rule of *Manson* v. *Brathwaite*, 432 U.S. 98 (1977), *i.e.*, whether "in the totality of the circumstances" the in-court identification was reliable even if the pretrial identification was suggestive. Under the *Manson* rule, "reliability is the

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[3] "S. Tr." refers to the transcript of the sentencing hearing of November 3, 1978; "H. Tr." refers to the transcript of the pretrial suppression hearing of July 31, 1978; and "Tr." refers to the trial transcript.

linchpin in determining the admissibility of identification testimony" (*id.* at 114). The factors to be considered (first set forth in *Neil* v. *Biggers*, 409 U.S. 188, 199-200 (1972)), "include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation" (*Manson*, *supra*, 432 U.S. at 114).

Luttrell's identification of petitioner DiPalermo satisfies these criteria. Contrary to petitioner's assertions (79-815 Pet. 14), Luttrell had both ample time to observe petitioner and "motivation to study" him.[4] As the court of appeals observed (Pet. App. 8a), "Luttrell, after all, was responsible for scrutinizing visitors to the Ellis Street location, and he had a good deal of time during which to view DiPalermo, some of which was spent at relatively close range." Moreover, Luttrell was "certain" of his identification of DiPalermo (H. Tr. 10, 25-26, 50, 54; Tr. 568), and he was very careful in his testimony not to exaggerate—he testified for example, that Kassebaum "resembled" the man who had occupied the Ellis Street house and that another man "look[ed] like" one of the

[4]Luttrell testified that, on a Sunday approximately two weeks after Labor Day 1977, a car arrived at the Ellis Street site (Tr. 560, 594). DiPalermo exited from the rear seat; Luttrell watched him carefully, because he at first thought that DiPalermo was crippled, and Luttrell feared he would be held responsible if the man should fall on the decaying dock (H. Tr. 11, 45). While the precise amount of time that DiPalermo was in Luttrell's presence is not a matter of record, DiPalermo was present for the following events: the car pulled up to the dock, three men exited, the two younger men had a conversation with Luttrell and then returned to DiPalermo to confer with him, and the two men then returned to Luttrell to speak to him again (H. Tr. 10; Tr. 561-568).

two who had chauffeured DiPalermo (Tr. 575-576; H. Tr. 29). Finally, Luttrell did not testify at [illegible] about the pretrail photographic identification, and [illegible] trial court instructed the jury that it was to acquit DiPalmero if it had any "reasonable doubt as to the accuracy of [Luttrell's] identifiction" (Tr. 1580). Under these circumstances, Luttrell's in-court identification of DiPalermo was reliable. *Manson* v. *Brathwaite*, *supra*, 432 U.S. at 114-115; *United States* v. *Williams*, 596 F. 2d 44, 48-49 (2d Cir. 1979); *Cronnon* v. *Alabama*, 587 F. 2d 246, 249-250 (5th Cir.), cert. denied, 440 U.S. 974 (1979).[5]

b. Nor is there any merit to petitioner DiPalermo's argument (79-815 Pet. 16-17) that there was no evidence, absent Luttrell's identification, to sustain his conviction. The evidence showed that, in addition to DiPalermo's visit to the Ellis Street site at a time when the conspirators were having difficulty locating a laboratory, petitioner had two meetings on the street with co-defendant Gillette, from which the jury properly could have inferred that petitioner was giving directions to Gillette concerning the methaqualone manufacturing operation. Gillette was first observed by DEA surveillance at the Ellis Street site on October 18, 1977 (Pet. App. 4a; Tr. 945). The same day, about 15 minutes after making some telephone calls from a public booth, Gillette met with petitioner on a street corner in lower Manhattan, a block from petitioner's home. A DEA agent walking by the two overheard petitioner say, "It's a

[5]A claim identical to petitioner's contention (79-815 Pet. 13 n. *) that his counsel should have been present at the photographic display was, of course, considered and rejected by this Court in *United States* v. *Ash*, 413 U.S. 300 (1973). Petitioner suggests no reason for reconsidering that ruling.

lot of money;" Gillette replied, "I know it's a lot of money. That's why you got to straighten it out" (Pet. App. 4a; Tr. 662, 1010). Eight days later these events were repeated: Gillette left 135 Ellis Street, met petitioner at the same intersection in Manhattan, at which time petitioner was overheard saying, "This is what you do" (Pet. App. 4a; Tr. 947-950, 965-969). Five days later the chemicals were moved from the New Jersey warehouse to the Ellis Street laboratory (Pet. App. 4a).

These were far from coincidental actions, as the trial court noted (S. Tr. 20-21), and they justified the admission of a statement made by Gillette to Marchese on November 8 that the DEA surveillance that was observed by the conspirators on October 31 could have resulted from his meetings with petitioner DiPalermo (Pet. App. 5a; Tr. 224; C.A. App. A37).[6] In sum, despite petitioner's attempts to insulate himself, the evidence demonstrated his leadership role in the conspiracy.

2. Petitioner Lombardi contends (79-819 Pet. 12-18) that there was insufficient evidence of his participation in the conspiracy to justify the admission of co-

[6]Petitioner complains (79-815 Pet. 17) not about this statement but rather about an earlier statement by Gillette to Marchese that petitioner was his "friend in New York." But under the Second Circuit's rule that "hearsay [co-conspirator] declarations" may not be considered against a defendant unless "independent nonhearsay evidence" establishes his "participation in the conspiracy" by a "fair preponderance of the evidence" (*United States* v. *DeFillipo*, 590 F. 2d 1228, 1236 (2d Cir.), cert. denied, No. 78-6411 (June 4, 1979), citing *United States* v. *Geaney*, 417 F. 2d 1116 (2d Cir. 1969), cert. denied, 397 U.S. 1028 (1970)), neither the district court nor the court of appeals could consider that statement against petitioner DiPalermo unless it found that "a fair preponderance" of the independent evidence linked him to the conspiracy. As we have shown above, the independent evidence of petitioner's involvement was substantial.

conspirators' statements against him and that certain of the statements were not made in furtherance of the conspiracy. Again, these fact-bound questions were resolved against petitioner by both courts below, and they do not merit further review in this Court.

The independent, nonhearsay evidence at trial concerning petitioner Lombardi demonstrated that he was indeed a part of the conspiracy. On June 30, 1977, Gillette was seen driving away from the area of the New Jersey warehouse where the chemicals were stored, and his car was seen parked shortly thereafter in front of petitioner Lombardi's house; later that same day Gillette met with Marchese at the New Jersey warehouse and discussed the status of plans for storing the chemicals (Tr. 96, 862-863). On September 15, 1977, Gillette met with Marchese at the warehouse in the morning and later that day was seen leaving petitioner's home (Tr. 114-115, 638-643). Most importantly, Gillette drove the rental truck containing the chemicals from the New Jersey warehouse to petitioner's home on October 31, and later that day petitioner was seen driving the truck on a route leading to the Ellis Street laboratory (Pet. App. 4a-5a, 9a; Tr. 201, 734-735, 741, 743, 786-789, 951, 956-958).

This evidence, which, as the court of appeals noted (Pet. App. 11a), must be viewed " 'not in isolation but in conjunction[,]' " obviously established petitioner's participation in the conspiracy by a fair preponderance. Petitioner's claim that the Second Circuit's "fair preponderance" standard for the admission of co-conspirator statements conflicts with this Court's decision in *United States* v. *Nixon*, 418 U.S. 683 (1974), because dictum in *Nixon*, addressed to a different point, suggests a standard of sufficiency "to take the question to the jury" (*id.* at 701 n.14), is no more worthy of

review in this case than were identical claims in three previous cases in which the Second Circuit expressly declined to follow the *Nixon* dictum and this Court denied certiorari. *United States* v. *Mangan*, 575 F. 2d 32, 42 (2d Cir.), cert. denied, 439 U.S. 931 (1978); *United States* v. *Glazer*, 532 F. 2d 224, 228-229 (2d Cir.), cert. denied, 429 U.S. 844 (1976); *United States* v. *Wiley*, 519 F. 2d 1348, 1350-1351 (2d Cir. 1975), cert. denied *sub nom. James* v. *United States*, 423 U.S. 1058 (1976).

Petitioner's claim (79-819 Pet. 16-18) that some of the hearsay statements were not made in furtherance of the conspiracy and hence should not have been admitted against him is similarly lacking in merit. The statements in question, *i.e.* that Gillette said that "Herman" asked him if he could provide chemicals, and that "Herman" said he had manufactured quaaludes previously but had run out of chemicals (Tr. 68-69, 78), clearly relate to the formation of the conspiracy, for they show why Gillette was seeking Marchese's aid in locating chemicals. The next statement, dealing with petitioner's part-time residence in Staten Island (79-819 Pet. 18; Tr. 90), was made during a discussion about the delay in finding a suitable site for a laboratory. As such, it too was in furtherance of the conspiracy, for Gillette used "Herman's" absence from New York to explain the delay and assuage Marchese's concerns. The district court, therefore, acted well within its discretion in admitting these statements.[7]

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[7]In a related argument, petitioner Lombardi contends (79-819 Pet. 18-19) that the admission of Gillette's statements under the co-conspirator exception to the hearsay rule violated petitioner's confrontation rights under the Sixth Amendment. This claim is without merit, for this Court has consistently approved the constitutionality of admitting evidence pursuant to recognized exceptions to the hearsay rule. See, *e.g.*, *Mattox* v. *United States*, 156 U.S. 237, 240-244 (1895); *Pointer* v. *Texas*, 380 U.S. 400, 407 (1965); *California* v. *Green*, 399 U.S. 149, 165-168 (1970). Indeed, this Court has never found a Confrontation Clause violation where disputed statements were admitted under the federal co-conspirator's exception (see also *Ottomano* v. *United States*, 468 F. 2d 269, 273 (1st Cir. 1972), cert. denied, 409 U.S. 1128 (1973); *United States* v. *Addonizio*, 451 F. 2d 49, 71 (3d Cir. 1971), cert. denied, 405 U.S. 936 (1972)), and it has three times recently declined to review this issue. *Viner* v. *United States*, cert. denied, 436 U.S. 904 (1978); *McKethan* v. *United States*, cert. denied, 439 U.S. 936 (1978); *Moody* v. *United States*, cert. denied, No. 78-6878 (Oct. 1, 1979).

3. Petitioner Lombardi also argues (79-819 Pet. 20-26) that certain remarks made by the prosecutor in closing argument require a new trial. The court below reviewed these statements and properly found them not to merit reversal (Pet. App. 10a).

The record demonstrates that petitioner could not have been prejudiced by the comments in question. For example, the prosecutor's reference to the instant case as one involving "narcotics" (79-819 Pet. 23; Tr. 1220-1221) was quickly corrected by the district court, which then allowed the prosecutor to use the shorthand term "drug" case (Tr. 1220-1221). The prosecutor's reference to $10 million worth of drugs being kept off the streets (79-819 Pet. 23), was, in fact, supported by the record, which showed that, given the volume of chemicals purchased, the laboratory was capable of manufacturing two million methaqualone tablets at a street value of five to seven dollars per tablet (Tr. 79, 1071). Similarly, the alleged vouching for witnesses' credibility (79-819 Pet. 24) was, in reality, merely an argument that the witnesses had no motive to distort the truth (Tr. 1225-1228, 1247-1248, 1517). Each objection, moreover, was followed by a

cautionary instruction that the jury was to decide the case on the evidence, not arguments of counsel (Tr. 1247, 1518).[8] In a similar vein, the prosecutor himself tried to correct his unfortunate comments concerning defense counsel's purported agreement with him that "Herman" was guilty (79-819 Pet. 25; Tr. 1258, 1280). Finally, the comments about defense counsel's "gimmicks" (79-819 Pet. 24; Tr. 1250-1251) were merely legitimate responses to petitioner's attorney's tactics in cross-examination of the DEA agent who identified petitioner as the driver of the rental truck on October 31 (Tr. 810-823). In short, no reversible error occurred.

4. Finally, petitioner DiPalermo argues (79-815 Pet. 18) that he was entitled to cross-examine the confidential informants at his sentencing hearing and that he should have been provided prior statements of the agents, pursuant to the Jencks Act, 18 U.S.C. 3500. As petitioner points out (79-815 Pet. 18), these are the same issues that have been raised in the pending petition in *Fatico* v. *United States*, No. 79-789. We rely on the analysis contained in our brief in opposition in *Fatico*, a copy of which we are providing to counsel for petitioner.

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[8]Likewise, the prosecutor's statement that there was "uncontradicted evidence" in the case (Tr. 1547), when viewed in context, was merely a reference to the fact that the defendants' cross-examination had failed to discredit the evidence of the conspiracy. An objection interrupted the completion of this statement; hence, the trial court's curative instruction was not even required (Tr. 1547).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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